BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 07-05-391**
v.	)	
	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	**PUBLIC DECISION AND ORDER**
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 9:00 a.m. on April 3, 2008 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901 and continued on June 5, 2008.

BEFORE Brenda C. Phillips, Chair, John F. Schmutz, Martha K. Austin, and Paul Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman, Esquire
Deputy Attorney General
Counsel to the Board

Jean Lee Turner
Administrative Assistant to the Board

Roy S. Shiels, Esquire
on behalf of the Grievant

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Department
of Health and Social Services

PRELIMINARY PROCEDURAL MATTERS

A. Recusal

By letter dated March 25, 2008, the grievant asked "that Board Member Austin recuse herself from serving on the MERB panel hearing his grievance. This request is based on her prior personnel service for [the Department of Health and Social Services], serving with persons still at the Agency and persons who may take an active role in this grievance."

By letter dated March 31, 2008, the Department of Health and Social Services ("DHSS") opposed the request for recusal.

On April 2, 2008, the Chair of the Board notified the parties that she "has considered the grievant's motion to recuse Board Member Austin and the State's response, and it is the decision of the Board that the motion is DENIED."

At the start of the hearing on April 3, 2008, the grievant renewed his request to recuse Board Member Austin. Ms. Austin stated for the record her reasons why she did not believe she should recuse herself:

> I would be the first one to recuse myself if I thought there was a conflict or an appearance of impropriety. I've had no personal contact with these people [the witnesses from DHSS], haven't seen Ms. Collins [the agency representative at the hearing] since she left DHSS and went to the Department of Justice. That was a was a year before I retired. So I feel comfortable sitting on this case and feel comfortable that I can decide it fairly, based on the evidence presented.

Tr. at 37.

In *Harvey v. Zoning Board of Adjustment of Odessa*, Civ.A. No. 00A-04-007, 2000 WL 33111028 (Del. Super., Nov. 27, 2000) (Goldstein, J.), the plaintiff (Kathleen Harvey) argued that three members of the Board of Adjustment had conflicts of interest in deciding her appeal of a zoning permit for a veteran's memorial. Three of the members were married to other Town officials (one to the Mayor, one to a Town Council member, and one to a member of the Historic Commission member). The Superior Court observed that a Board member might have a disqualifying conflict of interest only if the member had "a direct, personal, and substantial pecuniary interest in the outcome of the case." 2000 WL 33111028, at p.3 (citing 29 *Del. C.* §5805(a)(1)[, (2))]. Under state law, "a state employee or official is considered to have a disqualifying conflict of interest when that person, or a close relative, has a financial interest in, or would accrue a financial benefit from, the subject of the matter pending before him. Although this statutory provision does not apply to employees of a municipality or township, the Court finds that it provides further guidance in this matter." 2000 WL 3311028, at p.3.

The Superior Court held that Harvey "has made no such showing [of financial interest], alleging only that the Board members' 'prior involvements with the parties, in the form of their familial relationships, lack actual elements of fairness due to the inherent conflict and bias.'" *Id.* "[T]he Court finds that Harvey has failed to show that the three members of the Board she identifies as having a conflict of interest have a direct, substantial, pecuniary interest in the subject matter of her appeal to the Board." *Id.* at p.4.

The grievant did not proffer any evidence that Board Member Austin has a direct, substantial, pecuniary interest in the outcome of his grievance to disqualify her from hearing this case. Instead, the grievant argued there might be an appearance of impropriety because of her

prior employment by DHSS.

In *Home Paramount Pest Control v. Gibbs*, No. 296, 2007, 2008 WL 187556 (Del., Jan. 17, 2008), the employer moved to vacate a decision by an Industrial Accident Board (IAB) hearing officer awarding worker's compensation. Under an established two-part analysis for conflicts of interest, the Supreme Court found that the "hearing officer satisfied herself that she was not biased, and we find no abuse of discretion in that ruling." 2008 WL 187556, at p.2 (footnote omitted). "The second determination, however, requires an examination of the facts as they appear to an outsider" which is an "objective determination." *Id.*

The IAB hearing officer had been denied a worker's compensation claim for the same injury claimed by Gibbs (carpal tunnel syndrome) six years before: the same attorney who represented Gibbs had represented the hearing officer; the same attorney who represented the IAB which denied her worker's comp claim represented the employer in the *Gibbs* case; and the two employers' experts were partners in the same medical practice and testified against awarding worker's compensation. The Supreme Court held these relationships created an appearance of impropriety. "As the decision-maker, instead of the claimant, the hearing officer was in a position to 'right the wrong' that had been done in her case." 2008 WL 187556, at p.2. "[A] person knowing this unusual overlap in both the claim and the participants would have a reasonable basis to question her impartiality." *Id.*

In contrast, Board Member Austin's prior employment at DHSS is too remote and tenuous a connection to require, under due process, her recusal from the Board. She was not involved in the decision to terminate the grievant (she had retired from DHSS five years before). Since then, she has not had personal contact with any of the DHSS witnesses. There is no unusual overlap

between the grievance and the participants to reasonably question her impartiality. Accordingly, the Board denies the grievant's motion to recuse Board Member Austin.

B. Jurisdiction – State Code of Conduct

At the start of the hearing on April 3, 2008, the grievant moved for a directed finding in his favor on the ground that DHSS could not fire him based on an alleged violation of the State Code of Conduct.

In the grievant's termination letter dated February 26, 2007, Secretary Meconi quoted the State Code of Conduct: "Each state employee . . . shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee . . . is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government. 29 Del. C. §5806. Your actions violated the Code of Conduct. You obtained video equipment for your personal use by misrepresenting the purchaser – as the State of Delaware/DSMHA – to the vendor."

The grievant argued the Public Integrity Commission has exclusive jurisdiction to interpret the State Code of Conduct and determine if a State employee or official has violated the Code and to impose discipline for a violation. The grievant argued that because DHSS did not have authority to determine whether he violated the Code of Conduct, it follows that DHSS did not have just cause to terminate him.

The Board does not agree. By statute, the "exclusive remedy available to a classified employee for the redress of an alleged wrong, arising under a misapplication of any provision of this chapter, the merit rules, or the Director's regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules." 29 *Del. C.* §5943(a)

The Public Integrity Commission has an independent statutory mandate to investigate and prosecute State officials and employees for violating the State Code of Conduct. *See* 29 *Del. C.* §5809. The Commission's enabling statute, however, does not vest exclusive jurisdiction in the Commission to discipline State employees if they violate the State Code of Conduct. The Commission's statute acknowledges the concurrent jurisdiction of this Board to decide if an employer has just cause to terminate a classified employee by authorizing the Commission to "remove, suspend, demote or take other appropriate disciplinary action . . . without regard to any limits imposed by Chapter 59 of [Title 29 of the *Delaware Code*]." Even if this Board determines that an employer did not have just cause to terminate and reinstates the employee, the Commission can pursue its own disciplinary action.

"'Absent a statutory provision designating which commission is to have overriding responsibility . . . the fact that the legislature has given responsibility to more than one agency suggests that each must exercise its own authority, using its standards and procedures, regardless of what the other agencies do under their delegation of power from the state.'" *Merchant v. State Ethics Commission*, 733 A.2d 287, 292 (Conn. App. 1999) (quoting *Smith v. Zoning Board of Appeals of Town of Greenwich*, 629 A.2d 1089, 1103 (Conn. 1993), *cert. denied*, 510 U.S. 1164 (1994)).

The Board's enabling statute provides that the "exclusive remedy available to a classified employee for the redress of any alleged wrong, arising out of any provision of this chapter, the merit rules or the Director's regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules." 29 *Del. C.* §5943(a). If the State terminates a classified employee and the employee grieves, then the Board has exclusive jurisdiction to

determine if the violation is just cause for termination, even if that requires deciding if a violation of the State Code of Conduct is just cause.

In *Matter of Hawaii Government Employees Association,* 170 P.3d 324 (Haw. 2007), the union argued that the Hawaii Labor Relations Board (HLRB) did not have jurisdiction to discipline state employees who violated the State Ethics Code by posting materials on the union workplace bulletin board supporting candidates for office. By statute, the HLRB has "exclusive original jurisdiction" over "any controversy concerning prohibited practices" and must "conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as if deems necessary and proper." Haw.Rev.Stat. §§ 89-14, 89-5(i)(4). The Hawaii Supreme Court held that "in exercising its [exclusive] jurisdiction to decide the Complaint, the Board was empowered to make such inquiries 'as it deemed necessary and proper' with respect to the application of the Ethics Code.'" 170 P.3d at 349 (quoting Haw.Rev.Stat. §89-5(i)(4)). "It follows, then, that in order to determine whether a prohibited practice occurred, the Board was necessarily required to decide the application of [the State Ethics Code] under the circumstances posed by Appellant's complaint." 170 P.3d at 350.

The Hawaii Supreme Court distinguished *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251 (Ind. 2000), where the Indiana Supreme Court held that a workplace Safety Board exceeded its statutory jurisdiction by deciding that the inspector who issued the citation violated the State Ethics Code. "In *Griffin*, the inspector's violation of the State Ethics Code was not related to the employer's alleged [Occupational Safety and Health Act] violation. Thus, an adjudication of the State Ethics Code violation by the Safety Board was not directly implicated by the alleged [OSHA] violation."

170 P.3d at 351.

Even if the Public Integrity Commission has exclusive jurisdiction over all matters relating to the State Code of Conduct, the Board does not need to determine whether the grievant violated the Code of Conduct. Under Merit Rule 12.1, the Board only needs to determine whether DHSS had just cause to terminate the grievant.

In *Ghosh v. Review Board of Indiana*, 866 N.E.2d 879, 2007 WL 1377728 (Ind. App., Oct. 24, 2007), the Indiana Department of Environmental Management ("IDEM") terminated a merit employee for using a state vehicle and credit card for personal use in violation of the State Ethics Code. On appeal, the Review Board decided that IDEM had just cause to terminate the employee.

> The Review Board does not have to determine whether Ghosh did or did not violate the Ethics Code. The issue before the Review Board is whether IDEM had just cause to discharge Ghosh. The fact that a Deputy Commissioner considered Ghosh's conduct a violation of the Ethics Code is not relevant to the Review Board's determination as to whether Ghosh's conduct constituted just cause for discharge . . . The Review Board finds that IDEM had just cause to discharge Ghosh. He claimed *per diems* to which he was clearly not entitled. He drove miles out of his way to purchase gasoline at a station where he admittedly was conducting business. His use of a state vehicle to go to and from the gasoline station was unauthorized and outside the scope of his employment.

2007 WL 1377728, at pp. 3-4.

The Court of Appeals of Indiana held that the Review Board did not exceed its authority by treading on the exclusive jurisdiction of the Indiana State Ethics Commission. "Our review of the record indicates that the Review Board did not base its denial of unemployment benefits on

Ghosh's alleged violation of the State Ethics Code. . . . Ghosh was terminated for using his company Voyager credit card at the Beech Grove business for which he is a registered agent. IDEM's Deputy Commissioner used improper terminology to express its true and proper reasoning for discharging Ghosh. And while IDEM should choose its words more carefully, the facts of this case remain the same." 2007 WL 1377728, at pp. 4,5.

The Board does not need to determine whether the grievant violated the State Code of Conduct in order to decide whether DHSS had just cause to terminate him. The Board bases its decision regarding his grievance on the Merit Rule just cause standard, not on the State Code of Conduct. [1]

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[1] In *City of Wilmington v. American Federation of State, County & Municipal Employees*, C.A. No. 19561-NC, 2003 WL 1530503, at p.4 (Del. Ch., Mar. 21, 2003) (Noble, V.C.), the Chancery Court held that the "scope of the grievance and the ensuing arbitration in which the employee must defend his position are framed through the termination notice. The City is not free to add new issues as the disciplinary process progresses." The Board agrees that the scope of grievant's appeal is framed by his termination notice and the Board will not entertain "reasoning other than that expressed by" DHSS in the notice. *JNK, LLC v. Kent County Council Regional Planning Commission*, Civ.A.No. 06C-03-066, 2007 WL 1653508, at p.7 (Del. Super., May 9, 2007) (Young, J.) ("review would be based on the articulated reasoning by the Commission itself" not on "post-hoc rationalizations"). In determining whether DHSS had just cause to terminate the grievant, the Board will only consider the offense charged in the termination letter: "You presented this [purchase] order to the vendor as a State of Delaware/DSAMH purchase . . . You had no authority or authorization to purchase the equipment on behalf of or in the name of DSAMH." At the hearing, the Board ruled that it would not consider whether the grievant violated an acceptable use policy because it was not the charged offense. Accordingly, the Board did not admit into evidence DHSS Exhibit 1-M (Department of Technology & Information Acceptable Use Policy) and excluded testimony about another employee's alleged misuse of the same laptop the grievant used.

C. Telephonic Testimony

By letter dated March 31, 2008, DHSS asked the Board to allow two witnesses (Alex Greenhut and Tekoa Pearson) to testify by telephone. According to DHSS, Mr. Greenhut works in New York City and "it would be a hardship for [him] to appear in person for a relatively short period of time to testify." According to DHSS, "Ms. Pearson has a very bad back and is limited in the amount of continuous driving she can do."

By letter dated April 1, 2008, the grievant opposed "the telephone testimony of Mr. Greenhut, whom I understand to be an important fact witness, where it is likely there will be different factual testimony, making credibility determinations important." Alternatively, the grievant asked the Board to allow four of his witnesses to testify by telephone.

On April 2, 2008, the Chair notified the parties that she granted the request by DHSS to allow Greenhut and Pearson to testify by telephone and the grievant's request to "allow Edward Rigsby to testify by telephone because he is presently out of state in Missouri. The Board will not allow Liz Clementoni, Joseph Avallone, or Joseph Capaldi to testify by telephone because the grievant has not demonstrated to the Board's satisfaction that they are unavailable to testify in person."

Under the Administrative Procedures Act, the Board has broad authority over the conduct of its hearings. *See* 29 *Del. C.* §10125. The Board believes that gives it discretion to take testimony by telephone in special circumstances.

> Generally speaking, a hearing officer has broad discretion in conducting administrative hearings. . . . Although there is no rule that specifically permits the board to take telephone testimony, [the state administrative code] requires a hearing ex-

> aminer to "conduct the hearing in such a manner as to prevent unnecessary delay, maintain order and ensure the development of a clear and adequate record." The language of the [state administrative code] is broad enough to allow a hearing examiner to take telephone testimony when such testimony prevents delay and is helpful to the development of an adequate record.

Holzhauser v. State Medical Board of Ohio, 2007 WL 2773472, at p.3 (Ohio App., Sept. 25, 2007) (allowing telephone testimony of a witness in Alabama unable to attend the hearing in Ohio).

In exercising its discretion, the Board considers whether the witness is truly unavailable, for example, is out of State or unable to attend the hearing because of age, illness, infirmity, or imprisonment. Mere inconvenience or personal preference of the witness to testify by telephone will not suffice.

Based on those criteria, the Board exercised its discretion to allow Mr. Greenhut and Mr. Rigsby to testify by telephone because they were out of State, and to allow Ms. Pearson to testify by telephone because her medical condition limited her ability to travel. The Board does not believe that the grievant showed any special circumstances to justify three of his other witnesses testifying by telephone at the hearing on April 3, 2008. [2]

The Board believes it properly exercised its discretion to allow some witnesses for each party to testify by telephone because of their unavailability.

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[2] At the continuation of the hearing on June 5, 2008, two of those witnesses (Clementoni and Capaldi) testified in person and the grievant did not call the third witness (Joseph Avallone). The Board allowed another of the grievant's witnesses (Sergeant David Benson) to testify by telephone because he was working at the Delaware Correctional Center.

BRIEF SUMMARY OF THE EVIDENCE

The Board's brief summary of the evidence in set forth in the Board's Non-Public Decision and Order.

FINDINGS OF FACT

The Board's findings of facts are set forth in the Board's Non-Public Decision and Order.

CONCLUSIONS OF LAW

The Board's conclusions of law are set forth in the Board's Non-Public Decision and Order.

ORDER

It is this 17th day of July, 2008, by a vote of 3-1, the Decision and Order of the Board that DHSS shall reinstate the grievant to his former or a equivalent position at DHSS as of the date of this Order without any backpay.

Brenda C. Phillips
Chair

John F. Schmutz
Member

Paul Houck
Member

I dissent. I believe the penalty of termination was appropriate under the circumstances.

Martha K. Austin
Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
>
> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
>
> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
>
> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: July 21, 2008

Distribution:
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Board Counsel

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